Supreme Court, U.S.
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NO.

In the
Supreme Court of the United States

OCTOBER TERM, 1993

MURPHY EXPLORATION &
PRODUCTION COMPANY
Petitioner

VERSUS

WILLIE EARL DAVIS
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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34 pp

QUESTIONS PRESENTED FOR REVIEW

1. In a Jones Act case asserting an employer's liability for an employee's development of an extremely rare disease, must medical causation in fact be proven with a reasonable evidentiary basis, although the burden of proof for negligence is "featherweight"?

2. May an employee not entitled to benefits under a Group Insurance Plan funded almost entirely by his employer, through misrepresentation, obtain a double recovery from his employer through operation of the collateral source rule, thereby allowing him to profit from his own dishonesty?

3. Is it a clear abuse of discretion to exclude probative, relevant evidence under Federal Rule of Evidence 403 where any unfair prejudice can be eliminated by editing the documents or giving the jury a limiting instruction?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REPORT OF OPINIONS BELOW iv

STATEMENT OF JURISDICTION v

STATUTES AT ISSUE vi

STATEMENT OF THE CASE 1

ARGUMENT 6

1. THE FIFTH CIRCUIT APPLIED THE WRONG STANDARD; A "COMPLETE ABSENCE OF PROBATIVE FACTUAL EVIDENCE ON THE ISSUE OF MEDICAL CAUSATION" IS NOT REQUIRED TO OVERTURN THE JURY'S VERDICT 6
2. THE FIFTH CIRCUIT'S RULING ON APPLICATION OF THE COLLATERAL SOURCE RULE RESULTS IN GROSS INEQUITY AND ELIMINATES ANY INCENTIVE TO EMPLOYERS TO MAINTAIN EMPLOYEE BENEFIT PLANS, BOTH ISSUES OF SIGNIFICANT SOCIAL IMPORTANCE 13
3. EXCLUSION OF RELEVANT AND PROBATIVE EVIDENCE UNDER FEDERAL RULE OF EVIDENCE 403 WHICH SEVERELY PREJUDICES THE DEFENSE OF THE CLAIM MUST BE CONSIDERED AN ABUSE OF THE DISTRICT COURT'S DISCRETION . 18

CONCLUSION 24

CERTIFICATE OF SERVICE 25

TABLE OF AUTHORITIES

PAGE

CASES:

Borras v. Sea-Land Services, Inc., 586 F.2d 881 (1st Cir. 1978) . . 8

Brock v. Merril Dow Pharmaceuticals, Inc., 874 F.2d 307 (5th Cir. 1989) 9

Chisolm v. Sabine Towing & Transportation Co., 679 F.2d 60 (5th Cir. 1982) 8

Daubert v. Merrell Dow Pharmaceuticals, Inc., ____ U.S. ____, 113 S.Ct. 2786 (1993) 12

Gauthier v. Crosby Marine Service, Inc., 752 F.2d 1085 (5th Cir. 1985) . 14

Phillips v. Western Co. of North America, 953 F.2d 923 (5th Cir. 1992) 14

Rogers v. Missouri Pacific Railroad Company, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957) 8

Vallot v. Central Gulf Lines, Inc., 641 F.2d 347 (5th Cir. 1981) 10

STATUTES:

Federal Rule of Evidence 403 . . 18,20, 23,i,viii

Jones Act, 46 U.S.C. §688 . . . . passim

28 U.S.C. §1254 v

28 U.S.C. §1291 4

REPORT OF OPINIONS BELOW

Davis v. ODECO, Inc.,
18 F.3d 1237 (5th Cir. 1994)

Davis v. ODECO, Inc.,
1992 WL 245670 (E.D.La. Sept. 14, 1992)

Davis v. ODECO, Inc.,
1992 WL 165698 (E.D.La. July 2, 1992)

Davis v. ODECO, Inc.,
1992 WL 125430 (E.D.La. May 15, 1992)

Davis v. ODECO, Inc.,
1992 WL 91988 (E.D.La. April 14, 1992)

Davis v. ODECO, Inc.,
1992 WL 40880 (E.D.La. February 20, 1992)

STATEMENT OF JURISDICTION

Jurisdiction in this Court is proper pursuant to 28 U.S.C. §1254, on application for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, from a Judgment issued April 4, 1994. Petitioner's Suggestion For Rehearing En Banc was denied by Order dated May 3, 1994.

STATUTES AT ISSUE

1. Jones Act, 46 U.S.C. §688

§688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) Limitation for certain aliens; applicability in lieu of other remedy. (1) No action may be maintained under subsection (a) or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time

of the incident giving rise to the action, if the incident occurred--

(A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of offshore mineral or energy resources -- including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and

(B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in Article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person --

(A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

2. Federal Rule Of Evidence 403

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

Willie Earl Davis ("Davis"), an ODECO, Inc. ("ODECO")[1] employee, brought suit against ODECO alleging he developed a rare disease diagnosed as Goodpasture's Syndrome ("GPS") as a result of exposure to hydrocarbon solvents during his employment. He asserted claims for negligence under the Jones Act and for unseaworthiness of various ODECO rigs under the General Maritime Law.

Davis claimed that he was entitled to maintenance and cure benefits, which Murphy denied inasmuch as medical and disability benefits had been paid pursuant to ODECO's Group Insurance Plan for non-

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1 Suit was originally filed against ODECO, Inc. which, during the course of the litigation, was reorganized and its successor-in-interest, Murphy Exploration and Production Company, a wholly owned subsidiary of Murphy Oil Company, was substituted as the party defendant.

occupational disability. Davis and his physicians, before he hired an attorney and filed his lawsuit, told Murphy his GPS was not work-related.

Prior to trial, the court excluded both evidence of the payments made under the Plan and the numerous Health Insurance Claim Forms submitted by Davis and his physicians to obtain payments for medical expenses and disability benefits. The basis for the court's ruling was that the Plan constituted a collateral source and the prejudicial nature of the forms outweighed their probative value. The court also ruled the forms were irrelevant because the payments made based on those forms were from a collateral source.

This matter proceeded to trial on August 17, 1992 before a jury. On August 28, 1992, the jury returned a verdict finding Murphy negligent, certain of its vessels unseaworthy (but not all of

them), negligence per se, and that the negligence, unseaworthiness and negligence per se were each a legal cause of Davis' illness. The jury found that Davis himself was 40 percent negligent, but that allocation of fault was precluded by the finding of negligence per se under Section 53 of FELA.

The jury awarded past medical expenses of $142,000.00 and maintenance of $12,600.00. The jury was never told that Davis had already collected $174,259.68 under the nonoccupational Group Insurance Plan. The jury awarded $400,000.00 for past, present and future pain and suffering, disability, loss of capacity for the enjoyment of life, mental anguish, and feelings of economic insecurity; past lost wages of $30,000.00; future loss of ability to earn money of $43,000.00; as well as $48,000.00 in future medical expenses.

This judgment was affirmed by a panel of the United States Court of Appeals for the Fifth Circuit on April 4, 1994, and a Suggestion For Rehearing En Banc was denied by that court on May 3, 1994. Jurisdiction in that court was proper pursuant to 28 U.S.C. §1291.

Davis, prior to February 28, 1990 (his last date worked), worked for ODECO approximately ten years. He served in various capacities aboard numerous ODECO rigs. Davis was diagnosed with GPS, a disease first identified in 1919 involving three components: kidney disease, lung disease and autoimmune disease. Since 1919, only 500 cases have been recorded worldwide. Davis alleged that his GPS was the result of his being exposed to hydrocarbon solvents, spray paint, and other chemicals with which he worked during his employment with ODECO. He claimed he was not provided with proper respiratory

protection and was not trained in the use of respirators during his employment.

Murphy maintained there is no connection between hydrocarbons and development of GPS, that the opinion of Davis' expert was based on incomplete, exaggerated and inaccurate data concerning alleged levels of exposures to hydrocarbons and the duration of those exposures. The evidence at trial showed that while Davis was employed, he spent only a very small portion of that time spray painting or using the chemicals and paints which he alleged caused his disease. Indeed, the appellate court found evidence of causation to be both "inconclusive" and "tenuous". 18 F.3d at 1242.

ARGUMENT

1. THE FIFTH CIRCUIT APPLIED THE WRONG STANDARD; A "COMPLETE ABSENCE OF PROBATIVE FACTUAL EVIDENCE ON THE ISSUE OF MEDICAL CAUSATION" IS NOT REQUIRED TO OVERTURN THE JURY'S VERDICT

Davis brought his claim for damages, alleging that because of Murphy's negligence, he was exposed to hydrocarbons and, as a result, contracted an extraordinarily rare disease, GPS. The Fifth Circuit, in reviewing the evidence submitted by Davis to establish a link between exposure to hydrocarbons and the development of GPS and, more particularly, Murphy's alleged negligence and Davis' GPS, recognized that "a causal relationship between such exposure and development of GPS has not been firmly established". 18 F.3d at 1240. At best, there is only a suggestion that exposure to hydrocarbons may spur development of GPS. Continuing, the court agreed "that the evidence supporting the hypothesis that exposure to hydrocarbons causes

GPS is inconclusive" and that "the narrower premise that Davis' exposure to hydrocarbons induced his GPS is even more tenuous". 18 F.3d at 1242.

The evidence submitted was so tenuous that the jury was left to base its decision on speculation. Davis' primary expert in support of his claims, Dr. R. Garth Kirkwood, unequivocally testified that "doctors don't know for sure exactly what causes Goodpasture's Syndrome to develop". (Tr., p. 530, l. 17)

That the courts, over the years, have held that the plaintiff-seaman in a Jones Act case has a "featherweight" burden of proof to establish negligence on the part of his employer is well established and has been nearly universally adopted. However, once negligence has been proven, the plaintiff still has the burden of proving that the negligent conduct complained of

was a cause in fact of the injury or illness. Chisolm v. Sabine Towing & Transportation Co., 679 F.2d 60, 62 (5th Cir. 1982). There must be a causal connection between the negligence and the injury in order for the negligence to be a legal cause of the injury. Id.

In Borras v. Sea-Land Services, Inc., 586 F.2d 881 (1st Cir. 1978), the court held that in a Jones Act case the "proofs must justify with reason" the conclusion that the employer's negligence was a cause of plaintiff's injury, citing Rogers v. Missouri Pacific Railroad Company, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957). Murphy would suggest that not only was there an absence of proof that any negligent acts on its part exposed Davis to hydrocarbons but that there was a complete absence of proof which would justify "with reason" a finding that hydrocarbons in fact cause GPS.

Dr. Kirkwood admitted that he could not prove such a connection. (Tr., p. 556, l. 9-25) Simply stated, the jury's finding of medical causation was based on speculation, and cannot be supported with reason. In Brock v. Merril Dow Pharmaceuticals, Inc., 874 F.2d 307 (5th Cir. 1989), the Fifth Circuit found that the court must determine whether the inferences drawn from the evidence by a jury were reasonable. Here, the jury was asked to conclude that exposure to hydrocarbons caused Davis' GPS during his employment. To do this, they were presented evidence which consisted of speculation and hypothesis. This Court can and should examine the reasonableness and sufficiency of the evidence submitted. Murphy would suggest that such an examination will lead to the conclusion that the evidence on medical causation was lacking and does not constitute the "reasonable

proof" of causation necessary to support the decision reached by the jury.

In Vallot v. Central Gulf Lines, Inc., 641 F.2d 347 (5th Cir. 1981), the court held that the standard for testing the sufficiency of the evidence in a Jones Act case is whether there is a reasonable evidentiary basis for the jury's verdict. Even taken in its best light, there was no reasonable evidence on which the jury could reasonably conclude that hydrocarbons caused Davis' GPS.

There does not have to be "a complete absence of probative factual evidence on the issue of medical causation" for this Court to overturn the verdict. There must be sufficient evidence from which a reasonable inference can be drawn to establish a link between hydrocarbons and GPS. How can such a conclusion be drawn when the evidence at trial was inconclusive, tenuous and, at best, suggestive?

Davis' own experts admitted that the brightest minds in medical science do not know what causes GPS, yet the jury was asked to find that exposure to hydrocarbons, in fact, caused Davis' GPS.

The age of "toxic tort" litigation is upon us. In increasing numbers, litigants are asking lay juries to decide complex medical issues which decades of medical experts have been unable to resolve. The Fifth Circuit's decision, if allowed to stand, means that any Jones Act claimant may, on the most scant medical evidence, establish employer negligence and medical causation to support a jury award for any disease which develops, regardless of the tenuous connection between employment and genesis of the disease. This is an issue of significant importance, as a single medical witness who makes a causal connection for a Jones Act plaintiff under his "featherweight" burden of proof can

now establish employer liability. This is a departure from the direction of this Court's decisions, such as Daubert v. Merrell Dow Pharmaceuticals, Inc., ____ U.S. ____, 113 S.Ct. 2786 (1993).

The standard for medical causation in examination of a jury's verdict should not be the complete absence of probative factual evidence. Rather, there must have been a reasonable evidentiary basis for the jury's conclusion. Here, there was nothing but speculation and guesses presented to the jury. This does not constitute a reasonable basis for the jury's decision and it should be overturned.

2. THE FIFTH CIRCUIT'S RULING ON APPLICATION OF THE COLLATERAL SOURCE RULE RESULTS IN GROSS INEQUITY AND ELIMINATES ANY INCENTIVE TO EMPLOYERS TO MAINTAIN EMPLOYEE BENEFIT PLANS, BOTH ISSUES OF SIGNIFICANT SOCIAL IMPORTANCE

In its decision, the Fifth Circuit affirmed the district court in ruling that Murphy's Group Insurance Plan, which paid Davis $174,259.68 in benefits, constituted a collateral source. Therefore, evidence of the Plan was properly excluded at trial, and setoff in favor of Murphy precluded. The effect of this ruling is that Davis will obtain a double recovery of medical benefits in the amount of $142,179.84 and, in addition to Accident & Sickness benefits obtained under the Plan, will also receive an award of maintenance in the amount of $12,600.00. This is the end result to Murphy, despite the fact that by the terms of its Plan, no benefits were payable to Davis if his illness was work-related. Only because Davis and his

physicians submitted Health Insurance Claim Forms to Murphy and its plan administrator, Pan-American Life Insurance Company, representing that Davis' illness was not work-related, were any payments made.

In all of the cases cited by the Fifth Circuit, including Phillips v. Western Co. of North America, 953 F.2d 923 (5th Cir. 1992), and Gauthier v. Crosby Marine Service, Inc., 752 F.2d 1085 (5th Cir. 1985), the plaintiff was entitled to receive the benefits deemed to be from a collateral source. Here, there has never been such a representation made. Clearly, Davis was only entitled to benefits under the Plan if his illness was not work-related. Payments were made to Davis on the basis of the representations made by both him and his treating physicians that the illness was not work-related. The court's ruling allows Davis to profit from

his own dishonesty. He, either intentionally or negligently, represented to Murphy that his illness was not work-related and, therefore, he obtained benefits under the Plan. His treating physicians did the same thing to obtain payment of their fees. Only later, after this wealth of benefits had been received, was it ever suggested that Davis' illness was work-related. That notification was the filing of a Jones Act lawsuit.

The social importance of this issue is clear. Under a plan such as Murphy's, an employee can assert a claim for an illness that is not work-related and collect benefits for three years under the plan. Then, still within the Jones Act/General Maritime Law prescriptive period, can file suit for damages against his employer and obtain a double recovery, confident in the knowledge that evidence of the payments received under the plan will not be intro-

duced at his liability trial because those payments are from a collateral source. The courts below have guaranteed dishonest employees a method by which they can profit from the benevolence of their employers in establishing a group insurance plan on their behalf.

What incentive remains for employers to maintain group insurance plans for the benefit of employees to protect them from non-work-related illnesses and injuries, if they face the specter of double liability from those who would abuse the system? The Fifth Circuit recognized this in its opinion, but nevertheless failed to give the employer placed in this position any protection.

> Although we emphatically do not wish to discourage employers from taking prophylactic measures against future liability, in this case, the fact that the Plan applied exclusively to nonwork-related injuries leads us inexorably to the conclusion that the

> Plan was conceived not as a hedge against liability but as a fringe benefit to further compensate employees.

18 F.3d at 1248.

Benevolent employers, rather than being rewarded for taking care of their employees, can now face certain punishment at the hands of unscrupulous employees. The collateral source rule applied by the courts below brings just such a result. This result is grossly inequitable, unjust, and senseless. Employers who try to care for their employees should not face such an absurd result. The collateral source rule was not adopted by the courts to allow dishonest employees to double their recovery through misrepresentations to their employers. Murphy has sought not to take from Davis anything to which he was entitled. Davis was <u>never entitled</u> to receive the benefits he obtained under the Plan. He obtained

those benefits only through misrepresentation of his illness being non-work-related. Rather than prevent him from obtaining something to which he is not entitled, the court has rewarded him a double recovery instead. This decision should be reversed to prevent this result.

3. EXCLUSION OF RELEVANT AND PROBATIVE EVIDENCE UNDER FEDERAL RULE OF EVIDENCE 403 WHICH SEVERELY PREJUDICES THE DEFENSE OF THE CLAIM MUST BE CONSIDERED AN ABUSE OF THE DISTRICT COURT'S DISCRETION

Murphy sought to introduce at trial the Health Insurance Claim Forms submitted by Davis and his physicians to Murphy and Pan-American Life Insurance Company, for a number of reasons. First, the forms were sought to be introduced as evidence of the payments made. In addition, the forms were sought to be introduced to impeach Dr. R. Garth Kirkwood, Davis' primary treating physician and primary witness at

trial on the issue of causation. On all of the forms he submitted, Dr. Kirkwood indicated Davis' illness was not work-related. He changed his testimony before trial and opined that it was related to Davis' employment.

In addition, the forms were sought to be introduced to defend against Davis' claim for punitive damages for the alleged arbitrary and capricious failure to pay maintenance and cure. Murphy's claims examiner, Charles B. Guy, Sr., would have been called to testify at trial (his testimony was proffered by affidavit) to explain why maintenance and cure was not paid. When suit was filed, Mr. Guy investigated the claim and learned from the Employee Benefits Section of Murphy that all of the Health Insurance Claim Forms which had been submitted to Murphy and Pan-American Life Insurance Company reflected that Davis' illness was not

work-related. With these medical opinions in hand, the decision was made not to pay maintenance and cure benefits.

Given the court's exclusion of the Health Insurance Claim Forms, Murphy could not cross-examine and impeach Dr. Kirkwood at trial with respect to the clear change in his medical opinions. Also, Mr. Guy could not be called to testify because the court would not allow him to explain why maintenance and cure benefits were not paid. The jury was left with no explanation whatsoever with respect to defense of the maintenance and cure claim and Davis' claim for punitive damages for the alleged arbitrary and capricious refusal to pay maintenance and cure.

This issue is worthy of consideration by this Court to give district judges guidance on the proper limitations on their discretion with respect to application of Federal Rule of Evidence 403. As

the Fifth Circuit correctly pointed out, the court could have easily entered a limiting instruction to the jury to prevent prejudice to Davis with respect to these forms. 18 F.3d at 1247. Indeed, the forms themselves could have been edited to remove any information concerning a claim for insurance. The portions of the form which contain the physician's signature or stamp and the section setting forth the opinion of the relationship to employment were the essential elements of the forms sought to be introduced, both with respect to the defense of the maintenance and cure claim and with respect to medical causation and impeachment of Dr. Kirkwood.

Clearly, those portions of the forms were highly probative and directly relevant to the central issues in the case. The Fifth Circuit, in its ruling, acknowledged: "Technically, the district court

was probably incorrect in determining that the Forms literally had no relevance because they were evidence of a collateral source." 18 F.3d at 1247. The forms were relevant. They were probative in addressing the causation and maintenance and cure issues. The prejudice to the plaintiff, if any unfair prejudice existed, could have been easily alleviated by editing the forms or providing a limiting instruction to the jury.

But instead, the court precluded Murphy's defenses altogether. The court refused to allow Murphy to properly attack Dr. Kirkwood's opinions as to causation. Murphy was not allowed to impeach Dr. Kirkwood with his own earlier opinions concerning the lack of an employment relationship to Davis' alleged illness. Murphy was prevented from defending against the maintenance and cure and punitive damages claims because Mr. Guy

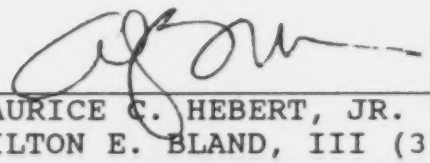
was not allowed to testify as to his reason for refusing to pay maintenance and cure and the results of the investigation he conducted.

This must be considered an abuse of discretion. Where relevant, probative evidence exists and any unfair prejudice to the opposing party can be eliminated through editing the documents and giving a limiting instruction to the jury, Federal Rule of Evidence 403 should not allow a district judge to exclude such evidence. This should be considered a clear abuse of discretion by the district judge, and the Judgment should be reversed at this Court to clarify the limits of such discretion in circumstances such as are presented here.

CONCLUSION

Murphy Exploration & Production Company respectively submits to this Honorable Court that a writ of certiorari in this matter on all three issues presented for consideration. These are issues of exceptional social importance and warrant consideration by the Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this 9th day of June, 1994 served a copy of the foregoing on all counsel of record via the United States Postal Service, properly addressed, and postage prepaid.